IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No.....

THE UNITED STATES OF AMERICA,
Plaintiff-Respondent,

vs.

FRED O. LOWE,
Defendant-Petitioner.

BRIEF IN SUPPORT OF PETITION.

Opinion of Court Below.

The opinion of the United States Circuit Court of Appeals for the 7th Circuit is that the scheme as particularized in each of the three counts in the indictment was sufficiently described. The court was also of the opinion that the case of *Dyhre* v. *Hudspeth,* 106 Fed. (2nd) 286 (10th Circuit) had similarity of facts to the case at bar, but proceeded to distinguish the said *Dyhre* case and the case at bar and affirmed the judgment of the District Court.

Sparks and Treanor, Circuit Judges and Briggle, District Judge, presiding. Judgment rendered October 29, 1940. (R. 40.) See judgment of Court in record.

To date the judgment of said Court has not appeared in the Federal Reporter.

Jurisdiction.

The jurisdiction of this court is invoked under Section 397 Title 28 of the United States Code. The judgment of the United States Circuit Court of Appeals for the 7th Circuit in the case at bar was entered October 29, 1940. The petition for Writ of Certiorari was filed November 22, 1940.

Facts.

The facts are stated in the petition, page 3.

ARGUMENT.

1. Conflict of Decisions.

The petitioner contends that there is a diversity of opinions between the United States Circuit Court of Appeals of the 10th, 3rd and 7th Circuits, as to the proposition of whether mailing was *independent of and after the termination of the scheme.*

(a) *Dyhre* v. *Hudspeth,* 106 Fed. (2nd) 286, 10th Circuit.

Defendant had pleaded guilty to a mail fraud indictment, was committed to Leavenworth, and there brought *habeas corpus* proceedings, upon the ground that the indictment was insufficient. It appeared that the indictment alleged in eight counts, that defendant had devised a scheme to defraud certain merchants, by obtaining merchandise by means of false and fraudulent representations. He represented to the merchants he had bank accounts in certain banks, and drew checks thereon, payable to the merchants, upon the strength of which he obtained the merchandise. In fact, he had no money on deposit in the banks to meet and pay the checks, and no intention, it was alleged, that the checks be paid. For the purpose of executing the scheme, he caused the various checks to be placed in letters, which were mailed. All but one of the checks was mailed on the day it was dated.

The court said—

> "The fraud charged in each of these counts standing alone is not within the jurisdiction of the federal court, but it may be brought within that jurisdiction by charging that defendant used the United States mail 'for the purpose of executing such scheme or artifice or attempting so to do.' That was charged here, but the charge clearly shows that the United

States mail could not have been used for the purpose of executing or in attempting to execute the fraudulent scheme, because the mailing did not take place until after the defendant had induced the parties named to accept his fraudulent check for merchandise. He had thus accomplished all he set out to do in falsely representing that he had money on deposit in the banks."

(b) *Goodman* v. *United States*, 97 Fed. (2nd) 197, 3rd Circuit.

"The scheme alleged was to obtain forged checks purporting to be drawn by the National Silver Company on the Chase National Bank of the city of New York, to secure introduction to Philadelphia banking institutions and to open accounts therein, in which the forged checks would be deposited, to procure the collection of the forged checks by the banks in which they were deposited and then to withdraw the money thus obtained. It was alleged to be part of a scheme that the forged checks would be forwarded from the Philadelphia banks in which they were deposited to the Chase National Bank of the city of New York by means of the Post Office Establishment of the United States. The 'defendants well knowing the customs and usages of the local bank of deposit in forwarding said checks * * * to the foreign bank by means of the Post Office Establishment of the United States, and intending that * * * checks * * * would be transmitted through the mails aforesaid.' "

The court said—page 199—

"Nor does he seriously contend that he is relieved by the fact that the letters transmitting the checks were actually prepared and mailed by innocent parties, namely, the employees of the bank, since the defendants in depositing the checks in Philadelphia for collection in New York must be held to have caused the letters to be placed in the mails by the bank employees as their agents."

(c) *United States of America* v. *Fred O. Lowe*, defendant (case at bar), 7th Circuit.

The indictment contained three counts.

The first count states—

Defendant caused a $4000.00 check dated May 26, 1936 to be drawn to his order against the V. M. Lowe account, then knowing "there was insufficient credit in said account • • • to meet and pay said check" and "other checks theretofore outstanding and drawn upon said account." He deposited the check "to the credit" of his Chaseburg account the same day, "well knowing at said time there were insufficient funds to meet and pay" in a Prairie City Bank. The check was, on that day, mailed to First Wisconsin National Bank of Milwaukee "for the purpose of collection in the regular course of business."

The second count states—

On May 27, 1936 defendant received from Prairie City Bank two money orders, one numbered 960, for $4000.00, dated May 26, 1936, the other numbered 961 for $2000.00 was dated May 27, 1936; they were issued "without authority and without consideration and were worthless"; the same day, he deposited the orders "to his credit" in the Chaseburg State Bank, then and there knowing that the orders were without authority or consideration, and "were worthless"; on the same day, the money orders were mailed to First Wisconsin National Bank "for the purpose of collection in the regular course of business."

The third count states—

The defendant delivered four checks to Prairie City Bank on May 23, 1936. Two of them, aggregating $2600.00 were drawn against his Chaseburg account; the remaining checks aggregating $8300 were drawn by one V. M. Lowe against his account at the Soldiers Grove station of the Peoples State Bank of Prairie du Chien, Wisconsin, payable to Prairie City Bank. There "were insufficient funds in the accounts" against which the checks were drawn to

meet and pay them, to his knowledge. He received, on the same day, from Prairie City Bank $600 in cash, $4000 to the credit of V. M. Lowe account in that bank, and four money orders in the aggregate amount of $9500.

All three counts containing the usual statutory allegation as to devising a scheme and artifice to defraud and for the purpose of executing said schemes cause to be placed a letter sent and delivered by the Post Office Establishment.

The Court said in part—

> "There is considerable similarity in the facts of the Dyhre case and the instant case, but in the instant case the utilization of the two checking accounts by the defendant for the purpose of obtaining checking account credit necessarily involved the use of the mails by the depositing bank. The adoption of such scheme by the defendant supplied the factual basis for the allegation that the defendant caused the letter containing the deposited check to be placed in the mail. But under the facts of the Dyhre case there is at least considerable doubt whether it can be said that there is a factual basis for an allegation that the defendant caused a letter to be placed in the mails for the purpose of executing his fraud. Under the allegations the defendant carried no transaction with any bank, but dealt with the merchants from whom he obtained property in exchange for the worthless checks. The merchants deposited the checks and thus performed the first act which was directly related to the depositing bank's act of forwarding the check for collection. But under the facts alleged in the first count of the indictment in question the granting of the $4000. credit for the checking account of defendant was inseparably tied up with the banking practice of forwarding the deposited check for collection. Defendant was assured of the use of his checking credit at least until the depositing bank was informed by the drawee bank that the check would not be paid. Whether the defendant intended to use this period of time for the purpose of exhausting his credit in the Chaseburg Bank, and thereby, getting the full benefit of the amount of the fraudulent check, or whether he intended to use the period of time for the purpose of creating sufficient credit in the

drawee bank to take care of the amount of the check, is not material. In either case the forwarding of the check for collection was one of the means of executing his scheme to obtain checking account credit in the Chaseburg Bank. The schemes to defraud which are set out in counts two and three are basically the same as the scheme in count one."

It is to be noted that the schemes in the case at bar, as alleged, extended only up to the point and time when defendant would deposit the checks, etc., to his credit. The schemes, if any exist, were consummated, completed and entirely executed before the mailing.

In each of the above cases, goods, credits, moneys or merchandise were secured before the mailing, can it therefore be said that the distinguishing factor is that in one case it is a bank and the other an individual? Whether a check is cashed by an individual or a bank, in both events, in the ordinary course of business practices, use of the mails is contemplated.

2. Public Importance.

If the case at bar is correct, any person depositing a check, at the time of the deposit, drawn against insufficient funds, is committing a *fraud* both upon the bank receiving the deposit and the bank upon which it is drawn, and in the usual course of business, the check would be mailed and be subject to a mail fraud charge.

There must be a line of demarkation, and the question definitely established, and how far the mail fraud statute is to go, foreign to the intentions of Congress.

If the decision at bar is correct, every check kiting case is a mail fraud case, and a multitude of prosecutions will result, at a great expense to the government.

It is further important that the question be settled once and for all as to administration of justice, and of the juris-

diction as between false pretense prosecutions under state laws, as against federal prosecutions under mail fraud statutes.

3. The scheme or artifice to defraud should be so fully stated as to enable the court to see, as a matter of law, that, if consummated, a fraud would be perpetrated.

> "The object of an indictment is two fold; first, to inform the defendant of the offense with which he is charged with such particularity as will enable him to prepare for his trial; second, so to define and identify the offense that the defendant may, if convicted or acquitted, be able to defend himself in case he be indicted again for the same offense, by pleading the record of such conviction or acquittal.
>
> Under this statute the scheme or artifice to defraud, it seems to me, should be so fully stated, as to enable the court to see, as a matter of law, that, if consummated, a fraud would be perpetrated."
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> *U. S.* v. *Loring,* (D. C. Ill.) 91 F. 881-884.

It is contended by the petitioner that it requires more than an allegation of particulars of the scheme. The allegations of the scheme must be so particularized that the face of the indictment *must* show as a matter of law, that it is fraudulent, *without reading facts* into the schemes as particularized.

The case of *Worthington* v. *United States,* 64 Fed. (2nd) 936, 938 as quoted by the Appellate Court in the case at bar, is not authority for the proposition stated therein. It is contended that it would *be good law, if the scheme would be particularized that the allegations would show as a matter of law that the scheme was fraudulent* and that the defendant upon acquittal or conviction could plead the same in defense upon another prosecution upon the same offense.

It is to be remembered that respondent has particularized, and having done so, the court will examine the schemes alleged.

It is to be remembered that in a mail fraud prosecution, the elements of the crime are—

(1) A scheme intended to defraud.

(2) An actual use of the mails in furtherance thereof.

Mazurosky v. *United States*, 100 Fed. (2nd) 958, 961.

The gist of the crime being the mailing, or the use of the mails—

> "No essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by *intendment or implication*, and *the charge must be made directly and not inferentially*, or by way of recital." (Italics ours.)
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> *United States* v. *Hess*, 124 U. S. 483, 486.

4. Courts cannot read facts into the case when none exists.

The opinion and judgment of the court below stated that the scheme alleged in Count 1, of the indictment—

> "* * * was intended to obtain a checking account credit from the Chaseburg Bank and such credit is a thing of value." (R. 42.)

That said opinion further states that

> "the facts alleged in count one do not disclose the ordinary case of a depositor-drawer who draws a check against his checking account with knowledge that his credit is not sufficient to cover the amount of the check." (R. 43.)
>
> "The scheme of the defendant, as revealed by the allegations of the indictment, was in substance a check kiting arrangement which could be successful, even temporarily, only because of the practice of the depositing bank of forwarding the check through its correspondent bank for collection from the account of the drawer in the drawee bank." (R. 44.)

That it is not alleged in the indictment, nor may it be inferred therefrom that defendant had any relations with

either of the banks in said indictment described other than that of depositor-drawer, or that the scheme therein described was in substance a check kiting arrangement.

The petitioner submits that courts cannot read facts into a case, and that the respondent having particularized, the court is strictly confined to the four corners of the indictment and any omission cannot be supplied by intendment or implication or speculative possibilities.

5. That the opinion of the court below further states that

> "* * * the schemes to defraud which are set out in counts two and three are basically the same as the scheme of count one." (R. 45.)

That is not alleged in the indictment, nor may it be inferred therefrom. That because said matters pertaining to Count I, discussed at length in said opinion, do not pertain to the allegations of Counts II and III, the case of *Dyhre* v. *Hudspeth,* 106 Fed. (2nd) 286 (10th Circuit) governs the allegations of Counts II and III.

Conclusion.

The defendant is fifty years of age, married, living happily with his family at Soldiers Grove, Wisconsin, where he has resided his entire life. He has only had the privilege of a 6th grade education in a country school. He has never been convicted of a misdemeanor or crime, and enjoys the highest respect for morality and honesty of all the people who know him.

He is the largest buyer of stock in the state of Wisconsin, has been engaged in the business for twenty-five years, his trucks pierce the very heart of the rich dairy and stock country of Iowa, Minnesota and Wisconsin. He has for a number of years paid out for stock on a Tuesday, with checks drawn on branch banks of the Prairie City Bank, located at Lynxville, Wisconsin, and Soldiers Grove, Wis-

consin, sums ranging around twenty-five thousand dollars. He has never kept books; he has used his check books for his entire transactions, seldom, if ever, getting his checks from the bank, relying entirely upon their honesty and accuracy.

Oscar Helbach, cashier of the Lynxville branch of the Prairie City Bank of Prairie du Chien, Wisconsin, admitted in open court on the trial of this case that he had appropriated to his own use, sixteen thousand dollars which belonged to the defendant, and a much larger sum, the exact amount of which defendant is unable to state, belonging to the depositors. Because of the defalcations, the stealing out of checks by said Oscar Helbach, cashier, which checks belonged to defendant, defendant was misled as to his bank account. Oscar Helbach, the cashier, further stated in his testimony that the defendant placed in the Bank at Lynxville, Wisconsin, to be deposited to his account, the sum of $4500.00; that he, Helbach, cashier, stole $2000.00 of that amount on the same day, without giving defendant any credit on the books of the bank.

Oscar Helbach, the cashier, was on the 13th day of September 1938 on his plea of guilty, sentenced by the United States District Court at Madison, Wisconsin, Judge Patrick Stone presiding, to four years at Leavenworth, Kansas, for defrauding the Prairie City Bank at Prairie du Chien, Wisconsin, out of the sum of $21,100.00.

There has been a civil action commenced and is now pending in the Circuit Court of Dane County, Wisconsin by this defendant against the Prairie City Bank, of Prairie du Chien, Wisconsin for the recovery of the sum of more than thirty-five thousand dollars, money belonging to this defendant which the said Oscar Helbach, cashier, appropriated to his own use.

Your petitioner respectfully submits that the final determination by this court of the questions involved is of ut-

most importance, not alone to the petitioner, but to the administration of justice, and to the public. The questions and reasons heretofore given should be definitely determined, and once and for all, set at rest as to whether or not the mail fraud statute is to cover a field foreign to the intentions of Congress. The decision of the United States Circuit Court of Appeals in the case at bar, is wholly in conflict with at least two other circuits, and is not alone contrary to law, but is contrary to sound principles of law. Unless the errors in the case at bar be corrected by this court, the effect will be to create regrettable confusion regarding questions as herein involved; create a multiplicity of prosecutions, expense to the government, and of the jurisdiction as between false pretense prosecutions under state law as against federal prosecutions under mail fraud statutes.

The question which this application suggests should be definitely settled by this court. Those questions are present in a large number of cases and involve great expense.

Respectfully submitted,

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